

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FRANK GATSKI,

Defendant-Appellant,

Supreme Court Docket No. 125740
Court of Appeals No. 243581
Circuit Court File No. 02-M-12151-AR
District Court File No. 01-2393-SM

RONALD J. SCHAFER (P56466)

Ionia County
Chief Assistant Prosecuting Attorney
Attorney for People/Appellee
100 West Main Street
Ionia, MI 48846

PATRICK M. DUFF (P35011)

Attorney for Defendant/Appellee
204 W. Bridge Street
Portland, MI 48875

125740
**PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

FILED

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STATEMENT OF APPELLATE JURISDICTION

The Michigan Court of Appeals has jurisdiction over this Leave to Appeal from the January 20th, 2004, judgement of the Court of Appeals, pursuant to MCR 7.301(A)(2).

QUESTIONS ON APPEAL

- I. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT MCL 324.73102 SUBSECTION (3), MEANT THAT A FISHERMAN WADING OR FLOATING LOGS COULD ENTER ONTO PRIVATE PROPERTY WITHIN THE CLEARLY DEFINED BANKS FOR WHATEVER REASON AND NOT BE IN VIOLATION OF MCLA 324.73102 (1)?**

Michigan Court of Appeals answers:	YES
Plaintiff-Appellee answers:	YES
Defendant-Appellant answers:	NO

- II. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT ARTICLE 18 OF THE FEDERAL ENERGY REGULATORY COMMISSION LICENSE HELD BY THE LICENSEE/COMPLAINANT DID NOT APPLY IN THIS CASE?**

Michigan Court of Appeals answers:	YES
Plaintiff-Appellee answers:	YES
Defendant-Appellant answers:	NO

STATEMENT OF FACTS

On November 10, 2001, at approximately 2:00 p.m., Officer Brad Dohm while patrolling Webber Dam, located in Lyons Township, Ionia County, noticed an individual standing on the concrete grating of the dam. This grating is placed approximately 200 feet from the dam and is approximately 150 feet long and is clearly visible even though at times it is up to 6 inches under the water in some areas. (See Attached Exhibits 1 through 5). This area is closed off to the public by no trespassing signs that are affixed to a cable that spans the width of the river and has affixed to it approximately 4 no trespassing signs spaced evenly apart. (See Attached Exhibits 1 through 5). The cable and no trespassing signs are at a height that requires a person to duck under them to gain access to that area. The State of Michigan and Consumers Energy maintain public walk ways on both sides of the dam that allow access around the blocked off area.

Officer Dohm watched the individual who was inside the restricted area, as he attempted to untangle his line from below the grate. Officer Dohm then motioned for the individual to come to shore. The individual then worked his fish a little while longer and then gave up when Officer Dohm continued to wave at him. The individual then walked across the grating on the streamside near the edge and climbed down from the grating. The individual then waded out to where his line came through the grating and again attempted to get the fish. The individual then broke his line, walked over to the concrete wall that is in the middle of the river, retrieved his jacket, ducked under the cable and no trespassing signs, and continued to Officer Dohm's location onshore.

Officer Dohm identified the individual as Frank Gatski by Michigan Drivers License. Mr. Gatski indicated to Officer Dohm that he was attempting to land a fish when it jumped up over the grate and got tangled up. He then went under the cable and no trespassing signs onto

the grate to get the fish and untangle his line. Based on the fact that Mr. Gatski was beyond the no trespassing signs and on Consumer Energy property engaging in the activity of fishing, as well as the fact that Mr. Gatski trespassed a second time to retrieve his jacket, Mr. Gatski was ticketed for Recreational Trespass under MCL 324.73102 (1).

On February 6, 2002, Mr. Gatski's attorney filed a Motion to Dismiss with the 64A District Court for Ionia County. On March 14, 2002, the District Court took testimony and the motion was continued to allow the prosecution time to obtain copies of the permits authorizing Consumers Energy to build a dam at the location in question. On April 10, 2002, after the District Court reviewed the permits authorizing Consumers Energy to build the dam at the location the District Court denied the Defendant's Motion to Dismiss. The District Court held that Consumers Energy did have the appropriate authorization to build the dam and that the Defendant did not fall within any exception listed in MCL 324. 73102.

The Defendant filed an Appeal with the Ionia County Circuit Court with oral arguments heard on August 14, 2002. The Circuit Court ruled that Article 18 of the Federal Energy Regulatory Commissions License did not apply. (See Attached Exhibit 6). The Court further ruled that the Defendant was not in violation of the recreational trespass statute due to the Judge's interpretation of the language in subsection (3) of MCL 324.73102 and overturned the District Court's holding and dismissed the case. On September 6, 2002, the Ionia County Prosecutors Office filed an Application for Leave to Appeal with the Michigan Court of Appeals. On November 1, 2002, the Michigan Court of Appeals granted the request for Leave to Appeal.

The Michigan Court of Appeals reversed the Ionia County Circuit Court's decision on January 20, 2004 in Case No. 243581. Defendant-Appellant filed an Application for Leave to Appeal on March 9, 2004.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN HOLDING THAT MCL 324.73102 (3), MEANT THAT A FISHERMAN WADING OR FLOATING COULD ENTER ONTO PRIVATE PROPERTY WITHIN THE CLEARLY DEFINED BANKS FOR WHATEVER REASON AND NOT BE IN VIOLATION OF MCLA 324.73102 (1).

STANDARD OF REVIEW

The standard of review followed by the Court of Appeals in reviewing questions of law such as this is *de novo*. People v Webb, 458 Mich 265, 274-275; 580 NW2d 884 (1998); People v Bloxon, 205 Mich App 236, 245; 517 NW2d 563 (1994).

Defendant Frank Gatski is charged with recreational trespass under MCL 324.73102 (1), which provides in part that a person shall not enter or remain upon the property of another person, to engage in any recreational activity without the consent of the owner if the property is posted in a conspicuous manner.

The Michigan Court of Appeals carefully considered the purpose of MCL 324.73102, in light of the Natural Resources and Environmental Protection Act of 1994, MCL 324.1 *et seq*. They held that “Defendant’s proposed construction would expand this subsection to absurdly create an unlimited right to enter property located within the banks of a river for any reason.” People v. Gatski, 260 Mich App 360, 368 (2004). The court further explained that “[s]uch a proposed construction would not accurately represent the legislative intent behind the statute and would render the latter portion of the subsection nugatory.” *Id*.

At the District Court Motion to Dismiss there was testimony taken from both Mr. Gatski and Officer Dohm that lead to the facts in this case being undisputed by either party. It is clear

from the undisputed facts which came out at the District Court hearing that Mr. Gatski knew he was trespassing as evidenced from his answers when questioned by the Court in regards to this issue at the Motion to Dismiss hearing. Question from the Court, “So you walked right pass the wire and the no trespassing signs?” answer from Mr. Gatski, “Yes.” Question by the Court, “We’ll get to the law shortly, I just want to know –there’s no question or doubt or dispute that you were behind the no trespassing signs?” answer from Mr. Gatski, “Correct.” (Motion to Dismiss Transcript, page 9). The District Court denied the Defendant’s Motion to Dismiss based partially upon the testimony of Mr. Gatski. The Defendant then filed an Appeal with the Circuit Court which reversed the District Court and granted the Defendant’s Motion to Dismiss.

The Circuit Court incorrectly interpreted MCLA 324.73102 (3), to hold that a person standing in the water with waders on and fishing is within the exception to recreational trespass as stated in MCL 324.73102 (3) which states:

“On fenced or posted property or farm property, a fisherman wading or floating a navigable public stream may, without written or oral consent, enter upon property within the clearly defined banks of the stream or, without damaging farm products, walk a route as closely proximate to the clearly defined banks as possible when necessary to avoid a natural or artificial hazard or obstruction including but not limited to, a dam, deep hole, or a fence or other exercise of ownership by riparian owner.”
(See Attached Exhibit 6)

The Court incorrectly held that the legislative intent was that a period could be placed in the middle of the paragraph after the word “stream” and creates two independent exceptions and not one exception as the statute correctly reads. The Circuit Court Judge found that the exception in section (3) meant that a fisherman wading or floating could enter onto private property within the clearly defined banks for whatever reason and not be in violation of recreational trespass. By interpreting section (3) as the Circuit Court did, the Court speculated as

to the legislative intent when the Court should have read the statute in its entirety without inserting punctuation that is not and never was in the statute. Case law has held that a court will not inject its interpretation into a statute when the statute is clear and unambiguous. “When the language of a statute is clear, it must be enforced as written.” People v Evans, 213 Mich App 671, 674-675; 540 NW2d 489 (1995).

Issues of statutory interpretation have been litigated at great lengths in the State of Michigan and the Courts have been very clear in their holdings. In Environmental Defense Fund et al., v Tennessee Valley Authority et al., 468 F2d 1164; 1972 US App Lexis 6308 (1972), the Court held that “Sections of statutes should not be considered out of context, and in interpreting legislation, courts will examine the entire statute, including its objects and policy.” The Circuit Court Judge failed to look at the objectives and policies behind the statute and chose to dissect the statute and not look at the entire statute when making his decision. Courts in Michigan have consistently held that unless the statute is ambiguous, the clear meaning of the statute as written must be applied. “A cardinal rule of statutory construction is that courts may not speculate as to the probable intent of the Legislature beyond the words employed in the statute. When the language of a statute is clear and unambiguous, judicial construction is neither required nor permitted. Such a statute must be applied, and not interpreted, since it speaks for itself.” In re Schnell, 214 Mich App 304, 309-310; 543 NW2d 11 (1995) It is clear from the case law that when a statute is unambiguous as MCLA 324.73102 is that it must be read and applied **as it is written**. In the case at hand, the Judge speculated as to the intent of the legislature and injected punctuation that was clearly left out and changed the underlying intent of the statute. Michigan Courts have further held that “when interpreting a statute, courts should avoid any constructions

that would render any part of a statute surplusage or nugatory.” Hoste v Shanty Creek Management, Inc. 459 Mich 561, 574; 592 NW2d 360 (1999).

The above cases are clear that when reading a statute or exception under a statute, one must read the sections it is written in the entirety not simply half of it. Attorney General Frank Kelley, in a 1978 opinion on the recreational trespass statute, may have put it best when he stated “the exception from criminal prosecution only applies where it is necessary for fisherman **to avoid** a natural or artificial hazard or obstruction, such as a dam, a deep hole or a fence.” OAG, 1978, No. 5330 page 1 (7/13/1978). (Emphasis Added) The Attorney General in that opinion followed the legislative intent and the statute as it was written and held that the exception in section (3) only applied to those who where **avoiding** a hazard such as a dam. The Attorney General’s interpretation of the recreational trespass statute follows the case law of this state as it applies to statutory interpretation. The Attorney General’s opinion on the nature of the exception is in following with case law on statutory interpretation in this state. And the Circuit Court judge erred in finding that section (3) could be read any other way.

The clear reading of section (3), as the legislature wrote it and intended, is that a fisherman wading or floating could either enter onto the property within the clearly defined banks or enter upon the land as close to the banks **to avoid** a natural or artificial obstruction such as a dam and not be trespassing. The statute’s intent was to allow fisherman the ability to avoid an obstruction, not the ability to ignore legally placed posted signs and enter onto private property for recreational activities. There was no dispute in the Circuit Court hearing that Consumer’s Energy was given the appropriate permission to build the dam through permits issued by the board of supervisors. The board of supervisors, therefore, conferred upon them the right to own that property in and around the Grand River as necessary to build and maintain the

dam within the permits granted. Furthermore, with the right to build and maintain the dam comes a responsibility to prevent to the best of their ability any harm to other landowner and members of the public who may use their property. By blocking off from public access the area close to the dam control gate, as was done in this case, Consumer Energy is limiting the public's risk of injury in the event of an accidental opening of the floodgates or other accident. Based on the Circuit Court ruling there would be nothing to prevent the Defendant or other persons from being able to wade or float right up to the floodgates or any other area of the dam so long as they stayed within the clearly defined banks. Such a ruling places the public at significant risk of injury and opens Consumers Energy to the risk of greater liability and problems maintaining safety for the dam. If the Circuit Court ruling stands then any fisherman would have a license to go onto any dam property without concern for their personal safety or the safety of the dam facility. A holding such as this greatly restricts the ability by the dam's owners to insure safety of the dam and the resources it provides.

Had the legislature intended the statute to read as the Circuit Court interpreted it, they would have created two separate exceptions under section (3) and not just one as it currently reads. Therefore, based on the above case law and the fact that the Circuit Court incorrectly interpreted section (3) of MCLA 324.73102, the Circuit Court's determination that sections (3) excepted Mr. Gatski from criminal prosecution must be reversed and the case remanded to the District Court for further proceedings.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT ARTICLE 18 OF THE FEDERAL ENERGY REGULATORY COMMISSION LICENSE HELD BY THE LICENSEE/COMPLAINANT DID NOT APPLY IN THIS CASE.

STANDARD OF REVIEW

The standard of review followed by the Court of Appeals in reviewing questions of law such as this is *de novo*. People v Webb, 458 Mich 265, 274-275; 580 NW2d 884 (1998) People v Bloxon, 205 Mich App 236, 245; 517 NW2d 563 (1994).

Defendant bases his argument on the notion that the Grand River is not a navigable river. However, the Michigan Court of Appeals correctly held that the Defendant, prior to appeal, did not dispute that “the Grand River [is] a public navigable river.” Gatski, at 369. This is reinforced by Defendant’s own Application for Leave to Appeal to the Michigan Supreme Court in which Defendant repeatedly refers to fisherman’s rights upon the navigable waters of Michigan. The Michigan Court of Appeals correctly held that the “Grand River is a navigable river.” Id. As such, the Grand River is subject to Article 18 of the Federal Energy Regulatory Commission License. Defendant cites The Daniel Ball, 77 US 557 (1870), for authority that the Grand River is not a navigable river. However, The Daniel Ball, 1876 US Dist LEXIS 128; 6 F Cas 1161 (1876), held that the Grand River was a navigable river. The Daniel Ball, at 1163. Furthermore, even should the dam be found to fall outside the scope of federal regulation, it nevertheless exists as private property, posted as no trespassing, and therefore Defendant’s trespass upon it was in violation of the recreational trespass statute.

The Circuit Court erred in holding that Article 18 of the Federal Energy Regulatory Commission License did not apply in this case. Article 18 of the Federal Energy Regulatory Commission License grants Consumer Energy the right to close off portions of the dam

including surrounding property and waters to the general public for safety reasons. The Circuit Court Judge held that Article 18 of the Federal Energy Regulatory Commission License did not preempt the state statute and allow Consumers Energy to restrict access to areas around the dam, especially the water.

The United States Congress established the Federal Power Commission to promulgate the Federal Water Power Act. The Federal Power Commission was abolished and all powers transferred to the Federal Energy Regulatory Commission pursuant to 42 USCS 7101 et seq. The main function of the Federal Energy Regulatory Commission is to issue new licenses and renew existing licenses to dams that are located on navigable rivers in the United States as required in 16 USCS 808 (1).

There is no dispute as to the fact that the Grand River is a navigable river and both parties have stipulated to this fact on the record in both the District Court and Circuit Court hearings. Both Federal and State Case law has clearly established that when dealing with a navigable river, such as the Grand River, that federal authority is supreme when Congress has already acted in that area. In Peterman v State of Michigan, 446 Mich 177; 521 NW2d 499 (1994), the court held that Michigan's power of navigation "is limited by the superior power of the general Government to secure the uninterrupted navigation of all navigable streams within the limits of the United States." The court went on further to state that "the navigable waters" are the public property of the nation, and subject to all the requisite legislation by Congress." Congress has granted Federal Energy Regulatory Commission the authority to license dams understanding that such structures can affect navigation. The United States Supreme Court dealt with this issue in Henry Ford & Sons, Incorporated v Little Falls Fibre Company et al., 280 US 369; 50 S Ct 140 (1930), a case in which the Court's main focus was on the amount of liability a licensee faces for

damages caused to downstream property owners. The Court did hear arguments on the issue of Congress's ability through the Federal Water Power Act to regulate all navigable waters and the effect this had on state laws. The argument stated by the respondent with which the Court agreed was that Congress acting through the Federal Water Power Act, has authorized the Commission to develop navigation and for that purpose to establish obstructions (dams) in navigable waters and subject only to the requirement of compensation for property taken the Commission's power when exercised is supreme.

Being a navigable river, the Grand River is then open to interstate commerce. Therefore, being a navigable river and having interstate commerce connections Congress can and did through the Commerce Clause authorize agencies like the Federal Energy Regulatory Commission to regulate facilities such as dams that affect navigation on the rivers. If Congress does authorize an agency to regulate facilities then that exercise of power is supreme and any regulations imposed take precedence over state legislation.

The court in Metropolitan Detroit Plumbing & Mechanical Contractors Association v Michigan Employment Security Commission, Michigan Employment Security Commission Board of Review, and Paul G. Beauvais, et al. 425 Mich 407; 390 NW2d 150 (1986), stated "The Supremacy Clause states: This Constitution, and the laws of the United States which shall be made pursuant thereof shall be the supreme law of the land; and the judges in every state shall be bound thereby . . ." Based on the supreme nature of the Federal Energy Regulatory Commission Act as approved and granted by Congress, the state statute is subordinate to the Congressional grant of authority allowing them to limit and restrict access to certain areas of the dam.

Based on the above case law it is clear that the Circuit Court should have found that Article 18 of the Federal Energy Regulatory Commission's license is supreme over any

exception in the state law, riparian rights or public trust rights that the state grants to the general public. Thus, giving Consumer Energy the authority to reserve or block public access to portions of the project waters close to the dam. Consumer Energy for safety reasons using a cable and no trespassing signs restricted the public's access to the waters within 200 feet of the dam. This restriction of access was within the powers conferred upon Consumers Energy by the license granted to them by the Federal Energy Regulatory Commission. Article 18 of that license clearly states:

“So far as is consistent with proper operations of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreation purposes, including fishing and hunting: **Provided**, that the **Licensee may reserve from public access** such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.” (emphasis added) (See Attached Exhibit 7, Federal Energy Guidelines and Federal Power Commission License).

Consumers Energy acted to protect life, health, and property, and restricted public access to the waters and other areas close to the dam by the placement of the no trespassing signs and cable. Consumers Energy and the State of Michigan also provided a public walk way around the areas closed off. This type of restriction to public access was clearly within the license issued to Consumer Energy by the Federal Energy Regulatory Commission. Therefore, for the Circuit Court to hold that Article 18 did not apply, clearly was to ignore the supreme nature of Congress and the authority it has over the navigable waters of the United States.

Based upon the case law cited above, the Circuit Court clearly did err in holding that Article 18 of the Federal Energy Regulatory Commission's license did not grant Consumer Energy the right to limit access to dam property including the waters. The Circuit Court over-

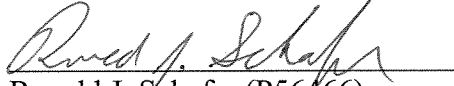
looked the fact that the authority granted to the Federal Energy Regulatory Commission preempted the state's statute and acted to limit the public's access to the waters. Therefore, the Circuit Courts decision to dismiss the case should be overturned and the case remanded to the District Court for further proceedings.

RELIEF REQUESTED

The Appellant requests that this Honorable Court Affirm the holding of the Michigan Court of Appeals and in doing so, Affirm the District Court's decision.

November 29, 2004

Respectfully submitted by

A handwritten signature in cursive script, appearing to read "Ronald J. Schafer", written over a horizontal line.

Ronald J. Schafer (P56466)

Ionia Prosecutors Office

Ionia County Courthouse

100 West Main Street

Ionia, MI 48846

(616) 527-5302